BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in the case of Charles M. Thomson, Trustee of the Chicago and North Western Railway Company, a corporation, Appellant, v. William F. Boles, Appellee, filed on November 25, 1941, appears on pages 419 to 435 of the printed transcript of the record, and is not yet reported. It will appear in volume .... Federal (2). .....

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari, and in the interest of brevity, are not repeated here. Reference will be made to such facts on the points involved, in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Eighth Circuit in its opinion filed in this cause on November 25, 1941, erred—

(1) In holding that the petitioner was not entitled to its requested instruction No. 5, which reads as follows:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employes a reasonably safe place in which to work and that when the employer has used such reason-

able care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard."

(2) In holding that in an action under the *Federal Employers' Liability Act* for personal injuries, it is not reversible error for the trial court to charge the jury that the employer owes the employe the absolute duty to furnish him with a safe place in which to work (Exception, 379-80).

(3) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, plaintiff, over the objection of the defendant, may show that the injured employe is married and has a family, and thereafter in the closing argument may refer to that fact.

(4) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, a verdict in favor of the plaintiff can be sustained, when counsel for the plaintiff in his closing argument has made unjustified highly inflammatory statements and has made a bitter and passionate attack on defendant, his witnesses and counsel, tending to stir up passion and prejudice of the jury.

(5) In holding that in an action under the Federal Employers' Liability Act for personal injuries to an employe, the court need not protect a suitor in his right to a verdict, uninfluenced by appeals of counsel to passion and prejudice, in the absence of exceptions to the improper remarks of counsel.

SUMMARY OF ARGUMENT.

I.

The defendant was entitled to have the jury instructed, as requested, relative to the employer's duty to use reasonable care to furnish the employe with a reasonably safe place in which to work.

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578;

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refg. Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills (CCA 8) 239 Fed. 785, 794;

Wisconsin & Arkansas Lbr. Co. v. Day, (CCA 8) 35 Fed. (2d) 563;

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Kaufman Dept. Stores v. Cranston, (CCA 3) 258 Fed. 917;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165.

II.

The Circuit Court of Appeals should have set aside the verdict and judgment, because of the error in admitting evidence showing that plaintiff was married and had a family, and the argument thereon made by plaintiff's counsel to the jury.

Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);
Lacorazza v. Cantalupo, 210 Fed. 875;
Southern Pacific Co. v. Ralston, 67 Fed. (2d) 958;
C. & N. W. Ry. v. Kelly, 74 Fed. (2d) 31;
C. & N. W. Ry. v. Kelly, 84 Fed. (2d) 569.

III.

The Circuit Court of Appeals should have set aside the verdict and judgment, because of the unjustified inflammatory argument, and appeals to passion and prejudice by plaintiff's counsel in his closing argument to the jury.

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;
F. W. Woolworth v. Wilson, 74 Fed. (2d) 439;
Brown v. Walter, 62 Fed. (2d) 798, (CCA 2);
M. St. P. & S. S. M. Ry. v. Moquin, 283 U. S. 520, 51 S. C. R. 501.

IV.

The decision of the Circuit Court of Appeals is contrary to applicable decisions of the Supreme Court of the United

States, and is at variance with decisions of other Circuit Courts of Appeal.

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165;

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refg. Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

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Kaufman Dept. Stores v. Cranston, (CCA 3) 258 Fed. 917;

Penn. v. Roy, 102 U. S. 451;

C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);

Lacorazza v. Cantalupo, 210 Fed. 875 (CCA 2);

Southern Pacific Co. v. Ralston, 67 Fed. (2d) 958 (CCA 10);

N. Y. C. R. Co. v. Johnson, 279 U. S. 310, 49 S. C. R. 301;

M. St. P. & S. S. M. Ry. v. Moquin, 283 U. S. 520, 51 S. C. R. 501;

Brown v. Walter, 62 Fed. (2d) 798 (CCA 2).

ARGUMENT.

I.

Failure to charge as to legal duty reversible error.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51-59, incl., Act of April 22, 1908, Chapter 149, Sec. 1-9, 35 Stat. 65, 66; amended act April 5, 1910, Chapter 143, Sec. 1-2, 36 Stat. 291), brought by the plaintiff to recover damages for personal injuries alleged to have been proximately caused by the failure of the defendant to use ordinary care to furnish the plaintiff, an employe, with a reasonably safe place in which to work.

The defendant duly requested the trial court to instruct the jury as follows:

> "You are instructed that an employer does not owe the employe a safe place in which to work. All the employer is required to do is to use reasonable care to furnish his employe a reasonably safe place in which to work and that when the employer has used such reasonable care to furnish his employe a reasonably safe place in which to work, he has discharged his full duty toward his employe in that regard" (R. 381).

An exception was taken to the refusal to instruct as requested (R. 380). The requested instruction was a correct statement of law, and was applicable to the facts in this case. To refuse to give this instruction or to advise the jury of the correct legal duty of defendant was reversible error.

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062;

Yazoo & M. R. R. Co. v. Mullins, 249 U. S. 531, 533; 39 S. C. R. 368, 63 L. Ed. 754;

B. & O. R. Co. v. Carroll, 280 U. S. 491, 496; 50 S. C. R. 182, 74 L. Ed. 566;

D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. C. R. 202, 73 L. Ed. 578.

The Circuit Court of Appeals held that the trial court sufficiently covered the substance of the requested instruction by the use of the following language:

> "If you find from the evidence in this case that the plaintiff was not engaged in the performance of his duties in the usual and customary manner, or that there was not a defect in the material or construction of the railing mentioned in the evidence and that it was reasonably safe for the employees of the defendant in the performance of their duties, or if you find that the railing was not reasonably safe because of a defect in the material or construction, and, yet, that such defect was not the proximate cause of the plaintiff's injuries, in whole or in part, then your verdict should be for the defendant" (R. 375).

The part of the charge of the trial court quoted by the Circuit Court of Appeals, does not correctly state the rule as to the defendant's duty to use reasonable care. In this part of the charge the court in effect tells the jury that if the railing mentioned in the evidence was reasonably safe for the employes of the defendant, in the performance of their duties, or if the same was not reasonably safe because of a defect in material or construction, and if such defect was not the proximate cause of the plaintiff's injuries, in whole or in part, then the verdict should be for the defendant. In other

words, the court actually charged the jury that the defendant was an insurer of the safety of the railing, instead of advising them of the correct legal rule incorporated in the requested instruction. Plainly, the failure to give the requested instruction, which clearly and succintly set out the legal duty of the defendant, was prejudicial error (exception to the above charge (R. 379-380).

Where a defendant requests instructions on the concrete, crucial questions at issue, it is error to refuse such request, even though the questions may be covered by a general charge.

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refining Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills (CCA 8) 239 Fed. 785, 794;

Wisconsin & Arkansas Lumber Co. v. Day, (CCA 8) 35 Fed. (2d) 563;

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Kaufman Department Stores v. Cranston, (CCA 3) 258 Fed. 917;

Penn. R. Co. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165.

As stated by the court in Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53:

> "The refusal of the court to give the instruction requested, therefore, violated the salutary rule that where the charge of a court states general rules of law govern-

ing the case, but fails to set forth the specific issues which the jury is called upon to determine and to apply the law to them, either party upon request is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those very issues."

II.

Admission of evidence that plaintiff married and had family reversible error.

At the very outset of the trial, plaintiff's counsel propounded to the plaintiff the following questions:

Q. "How old a man are you?

A. 48.

Q. When were you 48 years old?

A. Last April.

Q. That is on April 24th?

A. Yes, sir.

Q. 1940?

A. Right.

Q. Are you a married man?

A. Yes.

Mr. Rietz: That is objected to as immaterial and prejudicial.

The Court: The answer may stand.

Q. Do you reside with your wife and family?

A. Yes.

Mr. Rietz: Same objection.

The Court: I think there was an answer before your objection, and the answer may stand.

Q. Do you have a family?

A. Yes, sir.

Mr. Rietz: That is objected to. Let me get my objections in.

The Court: Do not answer the question until an objection is entered, if there is an effort made to make an objection.

Mr. Rietz: I object to that as immaterial and prejudicial.

Mr. DeParcq: It is proper to show that the witness or the plaintiff is married or has a family.

The Court: I think perhaps the matter should not be pursued further" (R. 59, 60).

In personal injury actions, evidence that the plaintiff is married or that he has children is not admissible, and the reception of such evidence is reversible error.

Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
C. & O. R. Co. v. Stojanowski, 191 Fed. 720 (CCA 2);
Lacorazza v. Cantalupo, 210 Fed. 875;
Southern Pac. Co. v. Ralston, 67 Fed. (2d) 958
C. & N. W. Ry. v. Kelly, 74 Fed. (2d) 31;
C. & N. W. Ry. v. Kelly, 84 Fed. (2d) 569.

In *Penn. v. Roy*, (102 U. S. 451, 459, 460) this court said:

"There was an error committed upon the trial, to which exception was duly taken, but it does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted against the objection of the defendant to give the number and ages of his children—a son 10 years of age, and three daughters of the ages respectively of 14, 17 and 21. This evidence does not appear to have been withdrawn from consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support and consequently that his injuries involved the comfort of his family. This

proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict."

As stated by the court in *Lacorazza v. Cantalupo,* 210 Fed. 875, 877-878 (CCA 2):

"We do not see what bearing the possession of a wife and seven children has upon a man's 'earning power'; but all questions as to the admissibility of such testimony in the Federal Courts is foreclosed by the opinion of the Supreme Court in Penn. v. Roy, 102 U. S. 451, 26 L. Ed. 141. It was there held that in actions of this sort such testimony is improper and should be excluded, and that it is reversible error to admit it over proper objections and exceptions.

"We regret much that we are constrained to reverse this judgment because in view of the injuries conceded to be received the amount of the verdict seems entirely reasonable and quite possibly the improper testimony did not operate to enlarge its amount; but unless this court is prepared to hold that it will not accept the rulings of the supreme court on questions of law, in cases precisely similar to these in which such rulings are made, we see nothing else to do except to reverse the judgment because of this error in the admission of testimony."

The Circuit Court of Appeals in the instant case stated—

"We have no reason to question his good faith in assuming

that it was proper to ask the questions above enumerated." The purpose that plaintiff's counsel had in mind in bringing out the fact that plaintiff was married, or whether he acted in good faith, is immaterial. Even though good faith on the part of counsel in bringing the marital status of the plaintiff before the jury could be considered, it is difficult to come to the conclusion that he acted in good faith when delivering the closing argument to the jury. He made the following statements,—"He has a wife and family, and he is in the hospital with a broken back" (R. 352). Again—"I will read that portion of it—'I have two children,—girls, aged 9 and 11. I am 48 years of age and married'" (R. 352). And at the conclusion of his argument he said—"Mr. Rietz would like to saddle the burden of the plaintiff and his family on to the public and taxpayers instead of upon this railroad company where it properly belongs" (R. 369). The only purpose of these unjustified statements was to induce a verdict based on prejudice rather than on the evidence.

The Circuit Court of Appeals attaches importance to the fact that later in the trial, defendant's counsel offered in evidence a statement given by the plaintiff, in which it appeared that the plaintiff was married, and had two children. When this exhibit was offered, the damage had already been done. The jury had been fully informed of the fact that plaintiff was married and had a family. Had plaintiff's attorney refrained from bringing into the case the marital status of the plaintiff, of course, that portion of the exhibit referring to the wife and family would not have been offered. The fact that it came into the case later, did not cure the error. *So. Pac. Ry. v. Ralston*, 67 Fed. (2d) 958.

III.

Affirming judgment based on appeals to passion and prejudice, reversible error.

The Circuit Court of Appeals refused to pass upon the impropriety of the closing argument of plaintiff's counsel, because it stated the defendant neglected to specifically except to each prejudicial statement in the argument, as the court held he was required to do in compliance with the following admonition contained in *London Guarantee & Accident Co. v. Woelfle*, 83 Fed. (2nd) 325:

> "In the future, to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, the bill of exceptions must contain all arguments in full and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument."

After quoting this admonition the court said: "A consideration of the entire record impels the view that this verdict should not be disturbed by reason of the claimed misconduct of counsel, in absence of a strict compliance with the admonitions stated above." The position of the Circuit Court of Appeals is in direct conflict with this court's decision in *N. Y. C. R. Co. v. Johnson*, 279 U. S. 310, 49 S. C. R. 301, wherein this court said:

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no im-

> portance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion and prejudice."

A reading of the argument of plaintiff's counsel shows that the prejudicial statements were not designed to aid the jury in arriving at a fair verdict, but on the contrary, were designed to appeal to the passion and prejudice of the jury and to create an atmosphere of hostility towards defendant, his counsel and witnesses, and to generate a feeling of sympathy for the plaintiff and his family. Plaintiff's attorney called attention to the fact that the case was properly pending in the trial court. He then told the jury that "irrespective of whether he (defendant's attorney) would rather be down there at the local division point (of defendant) with their friends and relatives of their employes on the jury, and probably before some local judge who is a politician and who is up for re-election every four or six years. As I say, maybe that is where he would like to try this lawsuit" (R. 345).

That part of the argument starting on page 345 of the transcript, second paragraph, to page 347, ending approximately with the first paragraph on that page, has been assigned as error (See record pp. 403-405). It is too long to be set out in full in this brief. Counsel there told the jury that Congress conferred great benefits on the railroads about rate matters; that Congress had passed a lot of laws giving

the railroads land and had opened the Treasury of the Union, giving them the taxpayers' money, and then counsel went on and told the jury that the railroads called that sound legislation (R. 345).

After calling attention to the claimed benefits given the railroad, counsel then proceeded to say that in order to counteract some of the advantages possessed by the railroads, Congress had permitted their employes to choose the courts in which to try their cases. The argument proceeded, and defendant was severely and unjustifiably castigated. The jury was informed—"that when an accident like this happens and a man is injured or killed, almost before the blood is cool they have got their claim agents out there lining up witnesses and *building up a defense*, and taking photographs and preparing a plat and taking statements from the man in the hospital right after the accident, sometimes within a day or two, and he had no advice and he has no lawyer and he hasn't had a chance to consult anyone, but they are out there *building up* and *manufacturing* a defense right after the accident."

The criticism leveled at defendant for taking statements and preparing a defense was highly improper. *Swanson v. Swanson,* 196 Minn. 298, 265 N. W. 39. Counsel continued his charge that defendant was dishonest in the preparation of the trial of the case, saying:

> "Now, as I discuss the evidence I think I will convince you that this defense of theirs is a fraudulent and dishonest defense. I think I can establish it is a lie and an attempt from beginning to end as such, and more than that it has been framed. You can frame some witnesses, but not all of them and they could not get all of them to lie in this lawsuit. The man, Mr. Hannum, would not lie about this. Hannum told the truth. He

> is one of their witnesses and they called him and they had to call him. They did not call Hannum because they wanted to. He called Hannum because I hollered for Hannum when this trial started, for cross examination and he knew he was in the city and he knew he better get him on the witness stand or he would hear about it later in the argument" (R. 347-48).

The statement that the defense was dishonest,—a lie from beginning to end, and that it had been framed, was highly improper and called for a reversal. *F. W. Woolworth v. Wilson*, 74 Fed. (2d) 439; *C. & N. W. R. Co. v. Kelly*, 84 Fed. (2d) 569.

The defendant had offered in evidence defendant's Exhibits 7, 8, and 9, which were part of the railing involved. The exhibits were received in evidence. Counsel in his argument with regard to these exhibits made the following statement to the jury: "We will see whether he is wrong about the cause of this accident, and if it had not been for Scamp, you would not have seen this railing" (R. 348). The defendant interrupted and objected to this statement (R. 349). The court did not sustain this objection, but in part at least lent its approval to this line of argument, saying—"There is no evidence to that effect. I am not sure yet what counsel is going to say is within the record or not. There may be some reason that justifies that course of argument. Just be careful to keep within the record and within the bounds of legitimate argument, counsel" (R. 349). There was no reason that justified this statement of the trial court. Counsel had completed his statement and the court knew the record did not sustain the statement. In the face of that situation the trial judge, instead of sustaining the objection and admonishing the jury to disregard it, stated that he did not

know whether what counsel was going to say was within the record. Defendant was not objecting to what counsel was going to say, but to what he had already improperly said.

It was the claim of plaintiff that one Harry Montgomery had assisted in repairing the railing after the accident. Montgomery was not produced as a witness by either side. He was as available to the plaintiff as he was to the defendant. In spite of that fact plaintiff's counsel severely criticized the defendant for not producing him, saying—

> "Now, Scamp took the witness stand and he described this railing in some detail, and after that description they had to do one of two things, they either had to bring in the railing or they had to deny that description and they couldn't very well bring witnesses in here and deny or dispute Scamp without bringing in that railing. Now, let us see about Scamp, how right and how wrong he was. Scamp said he and Harry Montgomery repaired it. You did not hear him say anything about Harry Montgomery—you did not see any Harry Montgomery on this witness stand. Where is he? Where is that employe? He said he wants to bring in all the evidence and wants to show you everything. Mr. Scamp said that he and Harry Montgomery are the only ones which repaired that railing. Scamp said they put in two 2x4s. Maybe he was wrong, maybe it was just one, but I don't know, but the fact remains that his testimony that he and Harry Montgomery did the repair work is undisputed. They did not produce Harry Montgomery and they did not account for his absence" (R. 349).

In truth it appeared conclusively that Montgomery was not an employe of defendant at the time of the trial. Scamp, plaintiff's witness, had testified to this fact:

> Q. "So far as you know is he still in the employ of this railway company?

A. No—not at this time" (R. 57).

On June 17, 1940, defendant claim agent interviewed plaintiff at the hospital and Boles gave a statement in writing relative to the accident. This statement was introduced in evidence by the defendant, and is defendant's Exhibit 1 (R. 114-116). Boles wrote into this statement in his own handwriting, the following: "I have read this and it is true", and then signed it. He admitted on the stand that he had read the statement before signing it (R. 117). This statement contained the following: "I was facing somewhat to the west, back to the east, and with buttock I think against the top cross-piece of railing and I do not think I was sitting with my whole weight on same, but was leaning against it with a good deal of my weight" (R. 115).

In his closing argument counsel for plaintiff made the following statement to the jury:

> "You have a right to consider what you have seen in this court room. Lawyers who want to conceal something are always objecting to everything. They insist on technicalities. He talks about the frills in this lawsuit. All the frills in this case and all the smoke screens and side issues, they were all put in here by Mr. Rietz to try to confuse and befuddle this issue and to try to confuse this jury" (R. 354-55).

The defendant had introduced the testimony of Peatschman, the engineer of the pile driver, who was one of the men who saw Boles sitting on the railing. Counsel referred to Peatschman in this manner:

> "Now, the only other witness they called to indicate to any degree that the blame or fault should be on Mr. Boles' part, is Peatschman. *I have seen a lot of fancy*

liars, and I have seen some pretty fancy ones, but I can say truthfully to this jury that I never saw a more infamous or more vicious unprincipled liar in my life than that fellow Peatschman. I have seen some pretty good ones *and I have seen some dished up by this railroad company,* but they never had one like that fellow before. He is the star witness of the defense. Here is the kind of testimony they ask you to take and turn down Boles, a good old faithful employe. I couldn't do it. I couldn't do it. If I were in his place, to bring in testimony like that in a public American court room and ask the Court and jury to accept it and believe it against an old employe that worked for my company for 23 years, who has a broken back and cannot work any more, if I were in his position I would want to go home and cover my head in shame. I couldn't do it. I hope I never have to do it. Let us look at this fellow they brought in here. They do not bring in his foreman. They bring in Peatschman" (R. 360-61). (Italics supplied.)

Toward the end of his closing argument to the jury, plaintiff's counsel stated:

"Mr. Rietz would like to saddle the burden of the plaintiff and his family onto the public and the taxpayers instead of upon this railroad company, where it properly belongs. They were to blame for this accident and they ought to pay and they ought to pay adequately and they ought to be willing to pay adequately. Mr. Boles is a good faithful employe and he has been a good citizen. If he were not a man of good character, if he were not a good American citizen, don't you suppose you would have heard about it in this lawsuit. If you did not have a good report on him, if that man had any stain or blemish on his life or on his career, don't you suppose they would have blackened him if they could?" (R. 369).

To this argument an objection was made by defendant's counsel. The court disposed of the objection, as follows: "His reputation is assumed to be good. You may proceed on that assumption in this case. You may proceed" (R. 369.)

In order for this court to get the full force of the prejudicial argument made by plaintiff's counsel, the entire argument should be read (R. 344-369).

As aptly stated by the Circuit Court of Appeals for the second circuit:

> "A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge" *Brown v. Walter*, 62 Fed. (2d) 798, (CCA 2).

In a case where no exceptions to the argument were taken, and where, for that reason, the Supreme Court of Minnesota declined to consider the error arising out of a prejudicial argument, this Court significantly said:

> "In actions under the Federal statute, no Verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice."
>
> *M. St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 51 S. C. R. 501.

Manifestly the defendant is entitled to a reversal so that there may be a verdict in this case uninfluenced by appeals of counsel to passion and prejudice.

IV.

Decision to be reviewed, in conflict with applicable decisions of this Court, and at variance with decisions of other Circuit Courts of Appeal.

The decision of the Circuit Court of Appeals in holding that a defendant is not entitled to a requested instruction which clearly and correctly states the law, even though it be assumed the matter was covered by a general charge, is contrary to the decisions of this court,

Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356;

Penn. v. W. F. Jacoby & Co., 242 U. S. 89, 37 S. Ct. 49, 61 L. Ed. 165

and is contrary to other decisions of the Circuit Court of Appeals of the Eighth Circuit,

Western Union Tel. Co. v. Morris, (CCA 8) 105 Fed. 49, 53;

Northern Central Coal Co. v. Hughes, (CCA 8) 224 Fed. 57, 59;

American Smelting & Refining Co. v. Riverside Dairy & Stock Farm (CCA 8) 236 Fed. 510;

Bates County v. Wills, 239 Fed. 785, 794;

Wisconsin & Ark. Lbr. Co. v. Day, 35 Fed. (2d) 563

and is at variance with the decisions of other Circuit Courts of Appeal.

Kaufman Dept. Stores v. Cranston, (CCA 3) 258 Fed. 917.

Further, the general charge did not give the correct legal rule in this case.

The decision of the Circuit Court of Appeals approving the conduct of plaintiff's counsel in introducing evidence to the effect plaintiff was married and had a family, and referring to the same in his argument, is contrary to the decision of this court in *Penn. v. Roy*, 102 U. S. 451, and is at variance with the decisions of other Circuit Courts of Appeal, to-wit: *C. & O. R. Co. v. Stojanowski*, 191 Fed. 720 (CCA 2); *Lacorazza v. Cantalupo*, 210 Fed. 875 (CCA 2); *Southern Pacific Co. v. Ralston*, 67 Fed. (2d) 958 (CCA 10).

The decision of the Circuit Court of Appeals of the Eighth Circuit, refusing to consider the highly inflammatory argument, and appeals to passion and prejudice of counsel for plaintiff, in the absence of exceptions, is contrary to the decisions of this court in *N. Y. C. R. Co. v. Johnson*, 279 U. S. 310, 49 S. C. R. 301, and in *M. St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 51 S. C. R. 501; and is at variance with the decision of another Circuit Court of Appeals, to-wit: *Brown v. Walter*, 62 Fed. (2d) 798, (CCA 2).

Therefore, petitioner prays that this Court issue its writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, and finally reverse said judgment.

Respectfully submitted,

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